

FIDUCIARY-RELATED QUESTIONS AND ANSWERS ABOUT THE YEAR 2000 (Y2K) COMPUTER PROBLEM

Q.1. *What is the Year 2000 problem and how does it affect employee benefit plans?*

A.1. The Year 2000 (Y2K) problem arises when a computer performing date-dependent computations or operations produces erroneous results because its system recognizes years only by the last two digits, causing a "00" entry to be read as the year "1900" rather than "2000." Because the computer systems, both hardware and software, produced in the past have commonly used the two-digit date designation, virtually all businesses are now faced with the enormous task of determining the extent to which their systems will be affected by the Year 2000 problem. Computer systems that are found to have a problem must be converted to a compliant format, i.e., a format that reflects the correct date. As a general matter, the conversion process is recognized as both time-consuming and expensive.

Like most business operations, employee benefit plans rely on computers for most of their critical operations such as benefit calculations and payments. The Year 2000 problem may affect these operations in serious and potentially unpredictable ways. For example, assume a plan provides that an employee becomes eligible to participate in the plan at age 21 with one year of service. For a participant born in 1979 and employed beginning in December, 1998, on January 1, 2000, the plan's computer system may miscalculate eligibility by showing the employee as *minus* 21 years of age and as having worked *minus* 99 years.

In addition, the Y2K problem is an issue for all of the businesses that provide critical services to employee benefit plans, such as banks, insurance companies, actuarial firms and investment management companies. The extent to which these businesses are affected by the Year 2000 problem could have serious consequences for their client plans.

Q.2. *What is a plan fiduciary's potential liability under the Employee Retirement Income Security Act (ERISA) with respect to the Year 2000 problem?*

A.2. As stated in the Department's February 9, 1998, Press Release, plan fiduciaries, such as plan administrators and trustees, are responsible for ensuring that plans and their participants and beneficiaries are protected. Such protection includes the establishment and implementation of a prudent procedure for ensuring that the plans' own computers, and, to the extent possible, those of the plans' service providers are Year 2000 compliant. ERISA establishes comprehensive standards to govern fiduciary conduct. Among other things, a plan fiduciary must discharge his or her duties with respect to a plan solely in the interest of the plan's participants and beneficiaries. In addition, a plan fiduciary must discharge those duties with "the care, skill, prudence and diligence under the

circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” A fiduciary’s failure to comply with ERISA’s fiduciary responsibility requirements may result in personal liability for losses incurred by a plan or its participants and beneficiaries.

Q.3. *What constitutes a prudent procedure for ensuring Year 2000 compliance?*

- A.3. Because the Year 2000 problem could have a substantial impact on plan investments, benefit payments and other essential plan operations, plan fiduciaries are responsible for establishing and implementing a strategy to evaluate and ensure Year 2000 compliance. Because of the complex and technological nature of this problem, however, plan fiduciaries may choose to hire outside consultants and experts to inventory, review, assess, convert and test the computer systems relating to the plan. The plan fiduciary’s selection of those service providers is subject to the same fiduciary considerations as the selection of other plan service providers.

In addition to addressing the Year 2000 problem as it relates to computer systems under their control, plan fiduciaries have an obligation to determine whether the plan’s critical operations will be endangered by the computer systems of unrelated service providers, such as third party administrators. In this regard, plan fiduciaries have an obligation to obtain information sufficient to evaluate each service provider’s Year 2000 compliance and to monitor that compliance to ensure the plan’s interests are protected.

Because of the pervasive nature of the Year 2000 problem, it may not be possible to prevent a disruption of computer operations. In recognition of that possibility, a plan fiduciary must determine how best to protect the plan and its participants and beneficiaries through the establishment of a contingency plan that will be implemented in the event the plan’s essential operations are affected.

Q.4. *To what extent are plan fiduciaries responsible for Year 2000 problems that are caused by unrelated plan service providers?*

- A.4. Plan fiduciaries are responsible for obtaining in a timely fashion appropriate information to evaluate the Year 2000 compliance of all of the plan’s service providers and determining what action is appropriate to ensure that the interests of the plan and its participants and beneficiaries are protected. In addition, when selecting service providers, plan fiduciaries should include Year 2000 compliance as another factor to be considered. Finally, the plan fiduciary is responsible for monitoring the service provider’s operations to ensure ongoing compliance and protection of the plan’s interests.

Q.5. *Can the plan be charged for the costs associated with the Year 2000 problem?*

- A.5. ERISA provides that reasonable expenses relating to the administration of an employee benefit plan may be charged to the plan. Also, the plan document should identify which costs may be charged to the plan. The issue of whether the cost of ameliorating the Year 2000 problem of a specific plan may be passed through depends on the terms of the plan document and whether the cost constitutes a reasonable administrative expense related to the plan.

For example, Company Y is a manufacturer and offers its employees a 401(k) plan through payroll deductions. Y has determined that its computerized payroll system is not Year 2000 compliant and large portions of its complex software system must be converted. As a general matter, Y is responsible for the costs of achieving Year 2000 compliance for its corporate payroll system, however, because the plan document permits charging the plan reasonable administrative fees, that portion of the cost relating directly to the plan's administration may be charged to the plan.

- Q.6. *Is the Department planning to implement an enforcement initiative with respect to the Year 2000 problem?*

- A.6. The Department's Pension and Welfare Benefits Administration (PWBA) investigators have already begun addressing the Year 2000 problem in the course of new and ongoing investigations. In those cases where plan fiduciaries have failed to act prudently in performing their plan duties and plan participants and beneficiaries have been adversely affected, appropriate enforcement action will be determined and pursued.

- Q.7. *What should a plan administrator disclose about the plan's year 2000 activities to participants and beneficiaries?*

- A.7. The Department strongly encourages plan administrators to disclose to their participants and beneficiaries the extent of the plan's Y2K preparedness. The administrator is encouraged to inform participants and beneficiaries as to the steps being taken to ensure the Y2K issue does not interrupt the operation of the plan or participants and beneficiaries access to their individual accounts.

Administrators are recommended to inform their participants and beneficiaries about:

- The plan's current level of readiness
- The strategy for bringing the plan's systems into Y2K compliance
- A timetable for when the critical systems will become Y2K compliant
- The level of compliance for service provider companies
- Possible effect on the participants and their beneficiaries should the plan become impaired in any way due to Y2K problems
- Any contingency, or backup, plans that have been devised in the event the plan is not Y2K compliant in time.

Q.8. *Are plan auditors, as part of their current engagements, required to detect potential record keeping problems associated with the year 2000?*

A.8. No. It is the plan administrator's responsibility for assessing and remedying any problems associated with the Y2K problem. Under generally accepted auditing standards (GAAS), the auditor does not have a responsibility to determine the effects of the Y2K issue on operational matters that do not affect the plan's ability to prepare financial statements for other than the year being audited.

SAS No. 83, Establishing an Understanding With the Client, requires auditors to obtain an understanding with the client regarding the services to be performed. This understanding is usually documented in an engagement letter addressed to the plan administrator and signed by the auditor. The Department of Labor encourages plan administrators to have language in engagement letters in order to clarify the auditor's responsibilities regarding the Y2K issue. This should minimize any confusion surrounding the auditor's duties and responsibilities. Engagement letters also should clarify how auditors intend to exercise their discretion to communicate matters that come to their attention relating to the Y2K issue in management letters or otherwise.

Q.9. *What information will be disclosed to the plan administrator by the plan's auditor relative to the Y2K problem?*

A.9. In general, the auditor is only obligated to list current system failures as reportable conditions and is not obligated to forecast future system failures. Therefore, the plan administrator cannot rely upon the plan's auditor to comment on potential record keeping problems regarding the Y2K issue that may arise in the future.

Plan auditors are extremely cautious about being associated with any assertions that their clients' systems are year 2000 compliant. The plan auditor's responsibility is limited to planning and performing his audit with the goal of obtaining reasonable assurance about whether the financial statements are free of material misstatement. The auditor is also responsible for reporting significant problems to the plan's management if such problems exist during the period being audited. The auditor's focus is on the current period, not future periods. Therefore, even in the event of an auditor becoming aware that in some period after the period being audited, the Y2K issue could adversely affect the plan's ability to process financial information, this potential future problem does not constitute a reportable condition in the current year.

Q.10. *What assurances will the Reports on the Processing of Transactions by Service Organizations (commonly referred to as SAS No. 70 reports) provide to plan administrators and their auditors regarding the Y2K issue?*

A.10 None. *The Reports on the Processing of Transactions by Service Organizations* (SAS No. 70 reports) are typically prepared by a service organizations' independent auditors. These reports can provide a level of assurance to plan administrators and auditors regarding the system of internal controls in place at the service organization. Because these reports deal with a historical perspective, they do not provide assurances for prospective periods regarding deficiencies which may affect those future periods (such as the Y2K issue). Accordingly, plan administrators and auditors should not expect the *Reports on the Processing of Transactions by Service Organizations* to provide any assurance on the organization's Y2K compliance.

Q.11. ***Whom should I call if I have questions about how to address the Year 2000 problem?***

A.11. The Department of Labor is not in a position to provide guidance regarding the technical issue of how to resolve the Y2K problem, however, a large amount of information on the topic is available through the Internet. Some useful Websites include:

Federal Financial Institutions Examination Council (FFIEC) - www.ffiec.gov - which provides a list of resources (bank association Websites and documents) useful to federally-supervised financial institutions as well as trade groups, vendors and companies providing services to institutions.

American Institute of Certified Public Accountants (AICPA) - www.aicpa.org - which also has established hyperlinks to many private sector and governmental Websites where helpful resources are identified.

The Small Business Administration (SBA) - www.sba.gov/y2k - which offers specific assistance to the small business owner on the Y2K problem.

Office of the Controller of the Currency (OCC) - www.occ.gov - which regulates and supervises national banks to ensure a safe, sound and competitive national banking system.

General Accounting Office (GAO) - www.gao.gov - which even includes an auditor's checklist for the computer crisis.

Securities and Exchange Commission (SEC) - www.sec.gov - which is responsible for administering the federal securities laws designed to protect investors in securities markets that operate fairly and ensure that investors have access to disclosure of all material information concerning publicly traded securities.

Information Technology Association of America (ITAA) - www.itaa.org.SIY2K.htm - which is a trade association representing the interests of the information technology industry.

General Services Administration (GSA) - www.itpolicy.gsa.gov/mks/y2000.gsadex.htm

- which contains information about planning, testing and contingency policy and also links to hundreds of private and public sites that offer advice and examples.

(The Pension and Welfare Benefits Administration, while providing a direct linkage to these resources, neither guarantees or assumes responsibility for the information provided by these Websites.)

Q.12. *Whom should I call if I have questions about my potential fiduciary liability?*

A.12. If you have questions regarding your potential fiduciary liability, you may contact the Pension and Welfare Benefits Administration's Regional Office that has jurisdiction in your state. A list of the agency's regional and field offices and their areas of jurisdiction may be found at this Website.